No. 16-402

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TIMOTHY IVORY CARPENTER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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BRIEF FOR PETITIONER

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QUESTION PRESENTED

Does the warrantless search and seizure of cell phone records including location data over the course of 127 days violate the Fourth Amendment?

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At issue in this case is the government's warrantless collection of Petitioner's long-term cell site location information. This collection is a search under any reasonable definition of the term. While there is certainly a place for the third-party doctrine, Petitioner's strong property and privacy interests in this location data are more than sufficient to override that doctrine in the case at hand. Because the Government violated Petitioner's right to be secure in his papers and effects, and because the Government also failed to obtain a sworn warrant, the search at issue is unreasonable, and violates Petitioner's Fourth Amendment rights. Accordingly, this Court should exclude the unlawfully gathered location evidence from further proceedings.

—— ARGUMENT ——

I. A SEARCH OF PAPERS AND EFFECTS OCCURRED.

In deciding cases such as the present one, this Court must, at a minimum, "assure[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." *Kyllo v. United States*, 533 U.S. 27, 34 (2001). This Court certainly may extend protections farther if it so desires, but it should not erode protections derivable from the provision's original public meaning. The first task in deciding Petitioner's case should thus be an analysis of that original meaning, particularly focusing on the role of property. If in fact the Government violated a property interest of Petitioner, it would follow that his Fourth Amendment rights were violated. *See United States v. Jones*, 565 U.S. 400, 409 (2012); *United States v. Jardines*, 569 U.S. ____ (2013) (slip op. at 3-4).[1]

"Words in a constitution . . . are always to be given the meaning they have in common use, unless there are very strong reasons to the contrary." *State of Tennessee v. Whitworth*, 117 U.S. 139, 147 (1886). "Ordinarily courts do not construe words used in the Constitution so as to give them a meaning more narrow than one which they had in the common parlance of the times in which the Constitution was written." *United States v. S.-E. Underwriters Ass'n*, 322 U.S. 533, 539 (1944). See also *Gibbons v. Ogden*, 9 Wheat. 1, 188 (1824); *United States v. Sprague*, 282 U.S. 716, 731 (1931).

"When the Fourth Amendment was adopted, as now, to 'search' meant '[t]o look over or through for the purpose of finding something; to explore; to examine by inspection; as, to search the house for a book; to search the wood for a thief.'" *Kyllo v. United States*, 533 U.S. 27, 32 n.1

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[1] To be sure, the decisions in *Jones* and *Jardines* dealt specifically with physical trespasses. But their reasoning can easily be extended to positive law in general (not necessarily even limited to property law). *See* William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 Harvard Law Review 1821, 1834-1836 (2016) (hereinafter *Positive Law Model*). The Fourth Amendment's close connection to property is demonstrated by the fact that an early draft used "property" instead of the final "effects" terminology. *See* New York Ratification Convention Debates and Proceedings (July 19, 1788), available at http://consource.org/document/ny-ratification-convention-debates-and-proceedings-1788-7-19/ ("[E]very freeman has a right to be secure from all unreasonable searches and seizures of his person, his papers, or his property… ")

(2001) (quoting Noah Webster, *An American Dictionary of the English Language* (1828)). Likewise, Samuel Johnson's prominent Founding-era dictionary defined to "search" as to "examine," "explore," "look through," "inquire," "seek," or "try to find." Samuel Johnson, *A Dictionary of the English Language* (10th ed. 1792). While the paradigm examples of unreasonable searches in the Founding era involved physical intrusions into houses, there is no reason to read the Fourth Amendment as applying only to such cases, since a "'remedy often extends beyond the particular act or mischief which first suggested the necessity of the law.'" J. Bishop, *Commentaries on Written Laws and Their Interpretation* § 51, p. 49 (1882) (quoting *Rex v. Marks*, 3 East 157, 165, 102 Eng. Rep. 557, 560 (K.B. 1802)). *See also* Aristocrotis, April 15, 1788, in 1 *The Complete Anti-Federalist* 210 (Herbert J. Storing ed., 1981) ("All communication between the people of the different states must as much as possible be prevented—therefore our own friends must be posts and postmasters, and they must have full power to break open all packets, letters, and papers of every sort … and it is requested of all our trusty friends throughout the country, that they intercept all papers, which come in their way; examine their contents, and if possible destroy them, if they contain any thing against this glorious plan.").[2]

What precisely was it that was searched in Petitioner's case? "Papers" and "effects" spring to mind. In the Founding era, papers would have been considered effects, although papers merited special protection in the Fourth Amendment's text because they are the owner's "dearest property," which "will hardly bear an inspection." *Entick v. Carrington*, 19 How. St. Tr. 1029, 1066 (1765). As will be explained in Part III, *infra*, CSLI seems to fit the bill, and it thus may be considered "papers." Yet even if one disagreed with this characterization, one would have to acknowledge that CSLI data is some type of effect. "Effects," as used in the Fourth Amendment, means "[g]oods, movable property." "*Effect, n.*," *Oxford English Dictionary Online.*

In the present case, the government examined cell site location data to try to find where Petitioner had been. This is clearly a "search" under any of the above definitions, and it is clearly a search of effects (and probably more specifically of papers). The trickier question, of course, is whether this search violated Petitioner's *own* Fourth Amendment rights.

II. THE SEARCH WAS OF PETITIONER'S OWN PAPERS AND EFFECTS.

"The obvious meaning of the [Fourth Amendment] is that *each* person has the right to be secure against unreasonable searches and seizures in *his own* person, house, papers, and effects." *Minnesota v. Carter*, 525 U.S. 83, 92 (1998) (Scalia, J., concurring). There are a number of factors that go into deciding whether something is an individual's "own" possession for Fourth Amendment purposes. One might be tempted to conclude that the individual must legally own the thing at issue, but this Court has wisely rejected that conclusion. *See, e.g., Minnesota v. Olson*, 495 U.S. 91, 95-100 (1990) (protecting an overnight guest against a search of his host's apartment). Indeed, "[p]eople call a house 'their' home when legal title is in the bank, when they rent it, and even when they merely occupy it rent free[.]" *Carter*, 525 U.S. at 95-96 (Scalia, J., concurring). *See Oystead v. Shed*, 13 Mass. 520, 523 (1816) (explaining that

[2] Note that this is an Anti-Federalist satire on Federalist views ("this glorious plan" refers to the Constitution, which was not yet in effect). This passage suggests that home intrusions were far from the only searches that worried Americans at the time the Constitution was drafted and ratified.

while "a stranger, or perhaps a visitor" could not bring a trespass suit against a police officer who broke into a house when that individual was present, the "inviolability of dwelling-houses" *did* extend to protect even "a boarder or a servant" "who have made the house their home."). Importantly, *Shed* suggests the idea of "shared ownership" for the Fourth Amendment: the fact that the house where a servant lived and worked was *his* house for trespass purposes did not make it any less his master's house. Both of them were protected against trespasses.

So for CSLI data to be Petitioner's own papers or effects, he need not have some sort of ultimate property right in the data. He need only have a sufficient connection (whatever that might mean) to the data, such that the data could reasonably be considered *his*. *Cf. Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) ("My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'").[3]

Can CSLI data fairly be considered Petitioner's *own* data? Yes. 47 U.S.C. 222 repeatedly describes this type of data as "customer proprietary network information," which it defines, in relevant part, as "information that relates to the quantity, technical configuration, type, destination, location, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship." 47 U.S.C. 222(h)(1). The statute further provides that "express prior authorization of the customer" is generally necessary for a telecommunications carrier to disclose customer proprietary network information. 47 U.S.C. 222(f).

The Government correctly notes that "the statute … permits disclosure 'as required by law.'" Brief for Respondent in No. 16–402, p. 21 (hereinafter Respondent's Brief) (quoting 47 U.S.C. 222(c)(1)). This would "include[] a *valid* court order issued pursuant to the SCA." *Id*. at 21-22 (emphasis added). The constitutional validity of the court order is *precisely* what is at issue. Since the Constitution is the supreme law of the land, a disclosure cannot be "required by law" if it violates the Fourth Amendment. And in any event an exception for legally required disclosures does not somehow erase the statute's acknowledgement that CSLI is Petitioner's *own* data.[4]

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[3] For a great explanation of why the *Katz* test can be seen as an expression of whose *own* effect something is, see Orin S. Kerr, *Reconciling Katz and the Fourth Amendment's Text*, https://reason.com/volokh/2017/12/21/reconciling-katz-and-the-fourth-amendmen.

[4] The Government observes that Section 222 would also consider dialed phone numbers to be customer proprietary network information. That, they claim, means that if this Court were to follow our argument it would need to overrule *Smith v. Maryland*, 442 U.S. 735 (1979), which held that the installation and use of a pen register to record a suspect's dialed numbers was not a Fourth Amendment search. Respondent's Brief 22. The Government's claim is highly problematic. First, *Smith* dealt with a *voluntary* data disclosure by a phone company, which presumably had the authority to consent to such a disclosure under the law as it then stood. The phone company was asked -- not *ordered* -- to install the pen register on their property, and it complied. This is similar to how a co-tenant with a general right to let in visitors can voluntarily let a police officer into the house when the other tenant is not present. *See, e.g., United States v. Matlock*, 415 U.S. 164 (1974). By contrast, in Petitioner's case *nobody* consented to the search. Recall also that only Petitioner has the general right to allow a consent-based search of his CSLI data; under Section 222, his phone company may only disclose CSLI when forced to by the government, when

The Government questions whether statutory provisions like Section 222 are relevant to Fourth Amendment cases, citing *Virginia v. Moore*, 553 U.S. 164 (2008). Respondent's Brief 22. That case dealt with whether police who make an arrest in violation of state law regulating police conduct automatically also violate the Fourth Amendment. This Court wisely ruled against that proposition, explaining that "[s]tates … remain[] free 'to impose higher standards on searches and seizures than required by the Federal Constitution'" (quoting *Cooper v. California*, 386 U.S. 58, 62 (1967)). However, in the course of deciding *Moore* the Court seemed to reach a broader conclusion: that the Fourth Amendment was originally understood as incorporating only the common law, and not statutes. *Moore*, 553 U.S. at 168-169. One wonders why the two need be mutually exclusive; would statutes really not have been considered at all relevant to early America's common law fabric? In any event, *Moore* may not have been an endorsement of our positive law theory, but it was far from the decisive rejection that the Government sees -- particularly given the Court's statement, shortly after concluding its historical discussion, that "history has not provided a conclusive answer," and the Court's subsequent turn to "traditional standards of reasonableness" to decide the case. *Id*. at 171. At bottom, we see no reason to privilege judge-made law over statutes when deciding Fourth Amendment cases. They should both be given weight when appropriate. Our position is not that modern laws can "'alter the content of the Fourth Amendment,'" Respondent's Brief 23 (citing *Moore,* 553 U.S. at 172), but rather that "our unchanging Constitution refers to other bodies of law that might themselves change." *Georgia v. Randolph*, 547 U.S. 103, 144 (2006) (Scalia, J., dissenting). The other law to which the Fourth Amendment refers may be found in privacy torts, property torts, federal and state statutes, and general common law rules or social understandings. *See generally Positive Law Model*.[5]

Even if one does not agree that Section 222 should be decisive, there is another important reason to consider Petitioner's CSLI to be *his* data under the Fourth Amendment. This Court has ruled that an overnight guest's lodging was essentially the boarder's "house" for Fourth Amendment purposes, *Olson*, 495 U.S., and we think Petitioner's connection to his CSLI is at least as strong as that boarder's connection to his host's home. Thus, *even if* one were to conclude that Petitioner had no general property right *per se* in CSLI, one could still find that the data was his "papers" or "effects" for Fourth Amendment purposes. As this Court put in it *Olson*, "hosts will more likely than not respect the privacy interests of their guests, who are entitled to a legitimate expectation of privacy despite the fact that they have no legal interest in the premises

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requested by Petitioner, and when acting pursuant to certain narrowly enumerated exceptions not relevant here. Furthermore, *Smith* was decided long before Section 222 was enacted in 1999. It may well be that *Smith* should come out differently if decided today, taking into consideration Section 222 and the changing social attitudes that forced that statute's adoption.

[5] A simple example of a provision of the Constitution that retains its meaning, but which refers to sources of law that change over time, would be the Takings Clause, which "does not purport to define property rights. We [the Supreme Court] have consistently held that 'the existence of a property interest is determined by reference to 'existing rules or understandings that stem from an independent source such as state law.' *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 164 (1998) (quoting *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972)). The same is true of the Fourteenth Amendment Due Process Clause's protection of 'property.' See *Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005) … [A] State must compensate its takings of even those property rights that did not exist at the time of the founding." *Randolph*, 547 U.S. at 144 (Scalia, J., dissenting).

and do not have the legal authority to determine who may or may not enter the household." *Id*. at 99.

The Government further claims that Petitioner renounced any property interest in his CSLI at trial: "Although petitioner now maintains … that the providers' cell-site records are his own 'papers' or 'effects,' he 'stipulate[d] and agree[d]' at trial that they instead were 'authentic and accurate business records of [MetroPCS and Sprint].'" Respondent's Brief 41-42.

This is an appallingly disingenuous characterization of Petitioner's statement. Here is a better account from earlier in the Government's brief: "'The parties stipulate[d] and agree[d] that the telephone call detail records from * * * Metro PCS and Sprint' were 'authentic and accurate business records of these companies.'" Respondent's Brief 7. As should now be clear, Petitioner merely affirmed the authenticity of the CSLI data. He did not say that he had no property right in the data; he merely affirmed that the data points were accurate business records. There is no contradiction between this position and Petitioner's current position. We completely agree that the data points are business records stored by MetroPCS and Sprint, but that says little about whether the information could *also* be Petitioner's property in some way.

The Government notes that "Petitioner did not create those records," Respondent's Brief 41. This is a red herring. One can imagine many cases in which someone authorizes a third party to create things for them, but still retains full rights to what is created. Recall that the aforementioned Section 222 describes data like CSLI as being "made available to the carrier by the customer solely by virtue of the carrier-customer relationship," 47 U.S.C. 222(h)(1). Petitioner delegated control of his information for certain specifically enumerated purposes, while naturally retaining the remainder of the rights.

Empirical survey data further supports the idea that Petitioner's cell site data is *his* (*i.e.*, he has a reasonable expectation of privacy in it). *See* Brief of *Amici Curiae* Empirical Fourth Amendment Scholars in Support of Petitioner, No. 16-402, pp. 1-2. Specifically, this research shows that most people have an expectation of privacy in cell site location information. "These empirical data … expressly undercut the Sixth Circuit's reliance on the third party doctrine in deciding this case, and affirmatively support a finding that warrantless searches of this information violate the Fourth Amendment." *Id*. at 2.

III. PETITIONER'S CSLI IS NOT MERELY BUSINESS RECORDS OR ROUTING INFORMATION; IT IS ALSO A DEEPLY PERSONAL WINDOW INTO HIS IDENTITY, DESERVING OF BETTER TREATMENT THAN THE GOVERNMENT'S MECHANICAL APPLICATION OF THE THIRD PARTY DOCTRINE.

The unfavorable appeals court ruling below, *United States v. Carpenter*, 819 F.3d 880 (6th Cir. 2016), suggested a sharp distinction between "the content of a communication and the information necessary to convey it." *Id*. at *883-*884. Along the same lines, in the present case, *amicus* Orin Kerr makes an analogy between the CSLI dispute and observation of someone traveling in public space -- the latter of which is obviously not prohibited. Brief of Professor Orin S. Kerr as *Amicus Curiae* in Support of Respondent in *Carpenter v. United States*, No. 16-402, pp. 4-7, 30. "What was previously Alice's publicly observable trip from her house to Bob's house is now [using a cell phone to connect instead] a record that the phone provider generated and

may keep about when the call was made, to and from what numbers, and what cell towers were used to deliver it." *Id*. at 6. This appears to be a form of Kerr's theory of "equilibrium adjustment," whereby Fourth Amendment protections change to return to some steady privacy baseline. *See* Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 Harvard Law Review 476 (2011). While we agree that Fourth Amendment law needs to preserve solid privacy baselines, we do not think that trying to figure out appropriate pre-digital analogies to contemporary problems is the best way to do this. Only at the highest level of generality are the two situations Kerr compares similar. There is a huge difference between observing someone on a public street, which anyone can lawfully do, and compelling a company to hand over data pertaining to customers -- data that is not generally available to the public. It is thus clear to us that the Fourth Amendment should protect non-content communications information. While the cell site information *could* be described merely as "routing information" or "business records," that would denigrate its importance as a locational record of Petitioner's movements.[6]

The Government's attempt to subject Petitioner's rights to a nebulous "balancing of interests," Respondent's Brief 50, "denies 'the people' their constitutional birthright." Brief of Scholars of the History and Original Meaning of the Fourth Amendment as *Amici Curiae* in Support of Petitioner, No. 16-402, p. 12. Congress' determinations regarding the level of judicial approval needed for a search are surely entitled to *some* deference, see Respondent's Brief 53-55, but this Court should not sit idly by when a government action is in clear violation of a constitutional mandate. However much the Government seems to believe it, Congress is not infallible.

One of the Government's *amici* notes that "people … may pressure companies to challenge government § 2703(d) orders more often." Brief of *Amicus Curiae* Michael Varco in Support of Respondent, No. 16-402, p. 19. Yet we doubt that such challenges would be any more successful under the Government's theory than customers' own challenges, given the Government's assertion of virtually unlimited authority to undertake "compulsory process" to obtain CSLI records. Respondent's Brief 44-45. The Government's own statements suggest that phone companies would fare no better in challenging court orders for customers' CSLI data than the customers themselves.[7]

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[6] The Government cites *Ex parte Jackson*, 96 U.S. 727 (1878), in support of its position that non-content communications information should receive significantly less protection than content information. Respondent's Brief 36-37. *Jackson* explained that "[l]etters and sealed packages of this kind in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles. The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be. Whilst in the mail, they can only be opened and examined under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to search in one's own household." *Id*. at 733. The Government misreads this passage -- it is quite clear that the distinction being drawn is not one between content and routing information but between exposed information and unexposed information. Petitioner's location records are unexposed to the public, and are shared with his cell provider in confidence, for specific and limited purposes.

[7] The Government's subpoena analogy theory would virtually eviscerate Fourth Amendment protections (are there *any* documents stored outside the home that would still be protected?) In any event, if this is indeed the consequence of subpoena precedent, then perhaps this Court should narrow or clarify its

The particular data at issue here is not a completely detailed map. The Government notes that it could not be certain, from the CSLI alone, which of many buildings within a certain area Petitioner might have entered. Respondent's Brief 24-26. Furthermore, conclusions based on cell site data surely require some inferences. Yet this Court has rejected "the novel proposition that inference insulates a search." *Kyllo*, 533 U.S. at 36. Moreover, the fact that Petitioner's CSLI could not pinpoint his exact location did not mean that one could not make reasonable inferences about his habits from the data. For instance, "In the early afternoon on a number of Sundays, Mr. Carpenter made or received calls from the overlapping sectors in which [a] church is located … Those cell site sectors do not routinely appear in Mr. Carpenter's records on other days of the week." Brief of *Amici Curiae* American Civil Liberties Union, *et al.*, in Nos. 14-1572 & 14-1805 (*United States v. Carpenter*) in the United States Court of Appeals for the Sixth Circuit, p. 11. Given this data, one could reasonably infer that Petitioner worshipped at that church every weekend. This is a deeply personal aspect of his identity.

Furthermore, the data allows inferences about Petitioner's relationships. "[O]n the nights of December 23–27, 2010, Mr. Carpenter's last call of the night and/or first call of the morning were from the sector nearest his home … But on the night of December 22, 2010, the last call of the night and first call of the next morning were placed from overlapping sectors in a Detroit neighborhood approximately four miles from his home." *Id*. at 12. *See* Jane Mayer, *What's the Matter with Metadata?*, New Yorker (June 6, 2013), https://www.newyorker.com/news/news-desk/whats-the-matter-with-metadata ("Such data can reveal, too, who is romantically involved with whom, by tracking the locations of cell phones at night.").

In the pre-digital age, such information about religious habits or relationships would normally have been knowable only by physically following Petitioner around for an extended period. Few police departments can afford to expend the time or manpower to send agents to follow one individual for a significant period of time who they think *might* have committed a crime. The type of surveillance at issue here, by contrast, is quite easy to do on a large scale. Under the current regime, pursuant to the Stored Communications Act, police need only display "specific and articulable facts" showing that the information sought is "relevant and material to an ongoing criminal investigation." 18 U.S.C. 2703(d). Thus, the government has little incentive to avoid employing CSLI surveillance. "In the precomputer age, the greatest protections of privacy were neither constitutional nor statutory, but practical." *Jones*, 565 U.S. at 429 (Alito, J., concurring in judgment). Now those practical protections are disappearing, and this Court needs to step up and apply the full protection of the Fourth Amendment.[8]

The third-party doctrine is, in many cases, an important, common-sense rule. For instance, if Jill tells Fred about a crime she committed and Fred then rats her out to the police, Jill will not have had her Fourth Amendment rights violated. Jill voluntarily disclosed her

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subpoena holdings. See Tr. of Oral Arg. 83-84 (Justices Roberts and Gorsuch questioning scope of subpoena power).

[8] It is important to note that GPS tracking of a car (at issue in *Jones*) would also have required significant inference in order for those viewing the data to discover extremely private information. For instance, a car might be tracked to a mall parking lot, but the police would not be able to tell from this data alone which of the many shops the car's driver had entered once inside the building.

information to a third party, and that third party then voluntarily disclosed the information to the police. But a description of why this situation *is* permissible helps to show why the surveillance of Petitioner's location data is *not* constitutionally permissible. Petitioner's disclosure of his cell site location information to his provider was only *semi*-voluntary. He did not affirmatively and knowingly "consent" to the disclosure in quite the same way that Jill did in the previous example. [9] Furthermore, Petitioner's provider did *not* voluntarily convey the data to the government. Rather, the government *compelled* disclosure of the data through a court order under the Stored Communications Act.

The key in distinguishing *Smith*, 442 U.S. 735, is to recognize the difference between a mandatory court order and a mere request. *Smith* dealt with the installation of a pen register, which recorded a suspect's dialed phone numbers, on phone company property. In that case, the police did *not* legally *order* the phone company to install the pen register. Rather, they simply requested the installation, and the phone company voluntarily complied. One could of course argue about whether the government exercises some sort of subtle coercion even in those types of cases, but the bottom line is that the phone company *voluntarily* gave the government the information. Thus, *Smith* is like the Jill and Fred example mentioned above -- someone gives incriminating information to someone else, who voluntarily decides to hand it over to the government. In other words, no search occurred. By contrast, in the present case MetroPCS and Sprint were *ordered* by the government to hand over data pertaining to Petitioner. It was most certainly not a voluntary transaction -- indeed, absent the express consent of Petitioner, the cell phone companies were *legally prohibited* from disclosing this data unless served with a binding legal order, per 47 U.S.C. 222. The present case and *Smith* are easily distinguishable because *Smith* involved something that was clearly not a search *at all.* And in any event, the *Smith* monitoring appears to have captured only one day of records before the police found what they were looking for. By contrast, the police took *127* days of records in Petitioner's case. Such a short-term precedent as *Smith* is a weak analogue for what is at issue here.

United States v. Miller, 425 U.S. 435 (1976), dealt with a grand jury subpoena, served on a bank, for an individual's financial records. This is fundamentally different from what occurred in the present case. Grand juries have long been recognized to possess a special and unique role in the justice system. *See, e.g.*, *United States v. R. Enterprises, Inc.*, 498 U.S. 292 (1991). Thus, precedents concerning grand jury subpoenas cannot easily be translated into a situation such as Petitioner's. And in any event, just like in *Smith*, the information searched was on a

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[9] In fact, since the federal government strictly regulates access to the airwaves (essentially giving major cell phone companies monopolies on the market), and also requires that those major companies (such as MetroPCS and Sprint) maintain certain location records of customers, the government essentially ends up forcing individuals who merely want to participate in society into giving up their location information. See Brief *Amicus Curiae* of United States Justice Foundation, *et al.* in Support of Petitioner in No. 16-402, pp. 21-36. "It would be unconscionable for a court to hold that a person has no Fourth Amendment right to keep the government from tracking his cell phone, when it is, in some part, federal law and regulation that requires the cell phone to be tracked. Legalization of constitutional violations does not make them constitutional … All this, the Sixth Circuit claims, was entirely voluntary and justified, ignoring the fact that the government designed the system which now allows it to engage in Orwellian surveillance of the American public." *Id*. at 36-37.

much smaller scale than Petitioner's cell data. Whereas Petitioner's case deals with a whopping 127 days of location monitoring, *Miller* merely dealt with some number of deposit slips and checks (the decision does not say), along with two financial statements and three monthly statements. To be clear, we do not necessarily claim that our positions are consistent with every single bit of the reasoning in *Smith* and *Miller*. But we think they are, at the very least, consistent with the Court's conclusions, and expand well on those precedents without sacrificing fundamental Fourth Amendment values.

A final, broader point about those two cases: each should be read merely as stating what was considered to be a reasonable expectation of privacy *at the time the decision was made*. To say that an expectation was generally considered reasonable or unreasonable several decades ago is quite far removed from saying it is reasonable or unreasonable *today*. We do think there is a place for the third-party doctrine. But we also have no doubt that there has been a profound shift in technology since the doctrine was formed, which could render old precedents completely inapplicable or even void, if this Court wanted to go down that route. "[The third party doctrine] is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks." *Jones*, 565 U.S. at 417 (Sotomayor, J., concurring). Secrecy need not be a prerequisite for privacy. "I would not assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection." *Id*. at 418. We agree wholeheartedly. We hope this Court will adopt a more nuanced view of three-body Fourth Amendment problems, one that takes into account the relatively new privacy concerns arising out of our digital world, and that respects the original purpose of the Amendment.

IV. THE SEARCH WAS UNREASONABLE BECAUSE IT WAS NOT AUTHORIZED BY A PROPER WARRANT.

The lecture notes of St. George Tucker, perhaps the premier Founding-era legal figure, make it clear that warrants were presumptively required for a search to be reasonable (aside from a few exigent circumstances) at the time the Fourth Amendment was adopted. Tucker, writing in the early 1790s, explained that searches or seizures without warrants were generally unreasonable -- with only a few narrowly defined exceptions:

> *13. The right of the people to be secure in their persons, houses, papers & effects, against unreasonable searches and seizures, shall not be violated—— What shall be deemed unreasonable searches and seizures. The same article informs us, by declaring, "that no warrant shall issue, but first, upon probable cause—*
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> *[P. 145]*
>
> *which cause secondly, must be supplied by oath or affirmation; thirdly the warrant must particularly described the place to be searched; and fourthly— the persons, or things to be seized. All other searches or seizures, except such as are thus authorized, are*

> *therefore unreasonable and unconstitutional. And herewith agrees our State bill of rights—Art. 10.*
>
> [...]
>
> *But this clause does not extend to repeal, or annul the common law principle that offenders may in certain cases be arrested, even without warrant. As in the case of riots, or breaches of the peace committed within view of a Justice of the Peace, or other peace officer of a county, who may in such cases cause the offender to be apprehended, or arrest him, without warrant.*
>
> *Nor can it be construed to restrain the authority, which not only peace officers, but every private person possesses, by the common law, to arrest any felon if they shall be present when the felony is committed*[.]

David T. Hardy, *The Lecture Notes of St. George Tucker: A Framing Era View of the Bill of Rights*, 103 Northwestern University Law Review Colloquy 272, 280 (2008).

This Court's modern doctrine also reflects the Founding-era ideal of the importance of a proper warrant as a check on discretionary search powers. *See, e.g., Katz v. United States*, 389 U.S. 347, 357 (1967); *Payton v. New York*, 445 U.S. 573, 583 (1980). Thus, the general rule, with some exceptions, should be that the government must get a *proper* warrant -- that is, one based on oath and probable cause -- before ordering the disclosure of information (particularly when that information is as sensitive as the location data at issue here).[10]

We want to clarify that this Court need not rule the Stored Communications Act unconstitutional in any part. We only ask this Court to rule that a proper warrant must issue before the government may compel a company to disclose information primarily useful to discover the location of a customer. The Stored Communications Act provides a warrant mechanism, 18 U.S.C. 2703(c)(1)(A), and thus the government simply must direct location inquiries through that mechanism -- while leaving other types of investigations, at least for now, to remain subject to the lower "relevant and material" standard also established by the Act. Since this Court must presume that Congress would not have authorized unconstitutional actions (*ut res magis valeat quam pereat*), it can interpret the Act in such a way that only searches for which a warrant is not constitutionally required are subject to the "relevant and material" standard. Searches for which a warrant *is* constitutionally required (including, we argue, CSLI searches) would of course not be authorized by that lower standard. Note that while there may be other types of currently-warrantless digital searches that should be treated

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[10] The Stored Communications Act court order at issue here was not supported by oath, which is what the Fourth Amendment requires for a warrant. *See* Petition for a Writ of Certiorari in *Carpenter v. United States* 3. (Of course, the government doesn't call this court order a warrant, but it certainly fits the Founding-era definition of a warrant, and serves the same function.) In any event, the verbal testimony of one suspect should not be enough to qualify for probable cause. The word of one person was decidedly not a sufficient basis for the government to search 127 days of Petitioner's location data.

like CSLI (*i.e.*, that should be subject to a warrant requirement), there is no need for this Court to decide on those issues right now. They are beyond the scope of the present litigation.

V. THE EXCLUSIONARY RULE MUST APPLY TO THE UNLAWFULLY-OBTAINED DATA.

Petitioner's cell site location data must be excluded from consideration as evidence. The exclusionary rule is an important manifestation of due process of law. *See* Richard M. Re, *The Due Process Exclusionary Rule*, 127 Harv. L. Rev. 1885 (2014). The due process clauses ensure that no person may be deprived of their life, liberty, or property without proper legal procedure consistent with the Constitution. Petitioner is facing a prison term that will likely last until his death. This is a major deprivation of his liberty, and can only be justified by proper legal procedure. Because the use of unlawfully obtained evidence does not constitute proper legal procedure, the cell site data must be subject to the exclusionary rule.[11]

Objections to exclusion tend to recall English Tory rhetoric of the 1700s, which the Founding Fathers *rejected*, much more than they do the libertarian Whig ideas of that century, which the Founders emulated. New historical research has demonstrated that the Founders almost certainly supported some form of what we now call the "exclusionary rule." *See* Roger Roots, *The Framers' Fourth Amendment Exclusionary Rule: The Mounting Evidence*, 15 Nev. L.J. 42 (2014). "[D]oes it follow that every thing in his Possession is sacred, and that nothing found in his Custody is to be used in Evidence by his Accuser?" asked one anti-exclusion Tory in 1765. The libertarian "Father of Candor" responded that "once admit the principle [that 'the prosecutor is at liberty to avail himself of whatever he can find … to prove the truth of his charge']," and "all the consequences of an unlimited State Inquisition follow of necessity … The only thing that is plain from this raw writer is, that he himself has no certain notion about the matter at all." Father of Candor's pamphlet was apparently widely read in America. The collections of George Washington's and Benjamin Franklin's papers at Harvard and Yale, respectively, both contain copies. *Id*. at 69-71.

In sum, then, the exclusionary rule is not merely a pragmatic tool designed to deter police misconduct. Rather, it is a remedy with deep roots in the American constitutional tradition, and one that deserves to be taken seriously by this Court. The "good faith exception" should not be blindly applied. "If every court confronted with a novel Fourth Amendment question were to skip directly to good faith, the government would be given *carte blanche* to violate constitutionally protected privacy rights, provided, of course, that a statute supposedly permits them to do so. The doctrine of good-faith reliance should not be a perpetual shield against the consequences of constitutional violations. In other words, if the exclusionary rule is to have any

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[11] We do not believe that the duration of the search should matter in the present case; that is why we ask for all the cell site data to be excluded. This is not to say that duration will *never* matter; this determination is context-specific and should depend on what the generally applicable statutory and common law says. Some recent research suggests that surveillance duration does not affect the public's privacy expectations. *See* Matthew B. Kugler & Lior Strahilevitz, *Surveillance Duration Doesn't Affect Privacy Expectations: An Empirical Test of the Mosaic Theory*, 2015 Supreme Court Review 4 (2016). Ultimately, rules that depend on free-floating duration concerns may be hard to administer, and create maddening line-drawing problems.

bite, courts must, from time to time, decide whether statutorily sanctioned conduct oversteps constitutional boundaries." *United States v. Warshak*, 631 F.3d 266, 282 n. 13 (6th Cir. 2010) (citation omitted).

—— CONCLUSION ——

The Founding Fathers wrote the Fourth Amendment in order to prevent the exercise of search and seizure powers that were, as an English court put it in a famous Founding-era case, "totally subversive of the liberty of the subject." *Wilkes v. Wood*, 98 Eng. Rep. 489, 498 (1763). The Founders recognized that discretionary surveillance power harmed not only those searched, but the entire society who had to live in insecurity and fear that their privacy and property rights would be violated. The Founding generation abhorred writs of assistance, the general warrants that allowed customs officers to search wherever they pleased -- and compel the assistance of any bystander. James Otis's famous speech condemned these writs as "the worst instrument of arbitrary power," placing "the liberty of every man in the hands of every petty officer." James Otis, *In Opposition to Writs of Assistance* (1761). It is hard not to see the parallels between the government's asserted power here and the writs of assistance. In both cases, the government claims virtually unlimited search power -- and claims that it may compel a third-party to assist in searching for a person or their property.

The ramifications of this Court's ruling in the present case will reach far beyond the specific facts at issue here. "Awareness that the government may be watching chills associational and expressive freedoms." *Jones*, 565 U.S. at 416 (Sotomayor, J., concurring). There is a strong connection between Fourth Amendment freedoms and the other fundamental birthrights of Americans. Numerous news organizations have filed an *amicus* brief in support of Petitioner, explaining that the history of the Fourth Amendment is intertwined with the First Amendment's guarantees of free expression and a free press. Brief *Amici Curiae* of the Reporters Committee for Freedom of the Press and 19 Media Organizations in Support of Petitioner, No. 16-402.

The Government today asks this Court to turn a blind eye to the erosions of privacy they seek to see authorized. This position is inconsistent with the American public's privacy concerns; indeed, the Government's claim that society is not prepared to recognize Petitioner's privacy expectation as reasonable is belied by the available evidence. The Government's position is also inconsistent with the original meaning, purpose, and spirit of the Fourth Amendment. And, most of all, it is inconsistent with the American tradition of freedom.

This Court's command should thus be simple: "Get a warrant." *Riley v. California*, 134 S. Ct. 2473, 2495 (2014). The decision below should be reversed.

Respectfully submitted,
William Foster / Taylor Kass
February 23, 2018